Filed 12/4/09 In re Chiara CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re STEPHEN DUANE CHIARA, On habeas corpus	A124488 (Humboldt County Super. Ct. No. CV 07-0325)

I. INTRODUCTION

On April 18, 2007, petitioner Stephen Chiara filed a petition for writ of habeas corpus. We summarily denied that writ. Our Supreme Court subsequently issued an order to show cause, returning Chiara's petition for a writ of habeas corpus to this court. We now grant his petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Stephen Chiara, along with co-defendants Richard Kesser and Jennifer Leahy, was convicted in 1993 in Humboldt County Superior Court of one count of first degree murder (Pen. Code, § 187), with the special circumstances of financial gain and lying-in-wait (Pen. Code, §§ 190.2, subd. (a)(1) and 190.2, subd. (a)(15)). Chiara, Kesser and Leahy were sentenced to life without the possibility of parole.

In 1995, this court affirmed all three convictions. In particular, we rejected defendants' argument under *Batson v. Kentucky* (1986) 476 U.S. 79, 98 (*Batson*), and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), that the prosecutor's peremptory challenges demonstrated a pattern of exclusion suggesting a deliberate attempt to keep

Native Americans, and those of Filipino or Japanese descent, off the jury panel. We disagreed, finding that the prosecutor gave satisfactory race-neutral reasons for his challenges. We did not, at that time, consider whether the prosecutor's reasons for challenging these jurors equally applied to the non-Native American jurors whom he accepted, a kind of analysis known as "comparative juror analysis," for the simple reason that *People v. Johnson* (1989) 47 Cal.3d 1194, 1221 (*Johnson*), precluded us from employing comparative juror analysis for the first time on appeal.

Chiara filed a petition for review in the California Supreme Court, as did his co-defendants. That petition was denied on March 14, 1996.

At this point, Chiara's path diverged from that of his co-defendants. Chiara filed no further appeals or writ petitions in either state or federal court. Chiara's co-defendants, Kesser and Leahy, however, filed petitions for a writ of habeas corpus in the Federal District Court for the Northern District of California. These petitions were denied in October and December 2001.

Kesser and Leahy then appealed to the United States Court of Appeals for the Ninth Circuit. A three-judge panel affirmed the district court in December 2004. A petition for rehearing en banc was granted and, on September 11, 2006, the Ninth Circuit, sitting en banc, reversed. The court granted Kesser and Leahy's habeas corpus petitions, and ordered a new trial. (*Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351 (*Kesser*).) The court specifically employed comparative juror analysis to conclude that the prosecutor improperly peremptorily challenged three Native American jurors for race-based reasons in violation of the equal protection clause of the Fourteenth Amendment.

Chiara, who was held in administrative segregation for substantial portions of 2006, did not learn of *Kesser* until late January 2007 -- four months after that decision was filed. Shortly after learning of the decision, he requested that counsel be appointed for him so he could present a habeas petition. On March 7, 2007, this request was denied. On April 18, 2007, Chiara filed a petition for writ of habeas corpus in pro per.

On May 21, 2007, the trial court requested that the prosecutor file an informal response. On June 11, 2007, the Humboldt County District Attorney requested that the petition be granted. In making this request, the prosecutor cited the fact that the California Supreme Court had recently granted review in a case that would determine whether, in California, comparative juror analysis could be conducted by an appellate court on review. The prosecutor also stated that, under the "concept of fairness" all three defendants should be retried at the same time, as they were originally tried together. Despite the prosecutor's request that the petition be granted, the trial court denied the petition on the ground that 11 years had passed since defendant's conviction and the filing of his habeas petition, thus making that filing untimely.

Chiara then sought relief in this court. On March 28, 2008, we summarily denied his petition.

After we denied Chiara's petition, the California Supreme Court issued its opinion in *People v. Lenix* (2008) 44 Cal.4th 602 (*Lenix*). In that decision, the court held that comparative juror analysis could be employed for the first time on appeal. Shortly thereafter, it issued an order to show cause, returning Chiara's petition for a writ of habeas corpus to this court. We now grant the petition.

III. DISCUSSION

A. *Order to Show Cause*

The California Supreme Court's issuance of an order to show cause returnable before a lower court is an " ' "implicit preliminary determination" ' " that the "petitioner ' "has made a sufficient prima facie statement of specific facts which, if established, entitle him to . . . relief . . . ." ' " (*In re Miranda* (2008) 43 Cal.4th 541, 575.) Our task, then, is to determine whether, on the facts before us, Chiara is entitled to relief. We conclude that he is.

B. *Timeliness*

The People argue that Chiara's petition for writ of habeas corpus is untimely and therefore barred by the rule that prohibits a defendant from seeking a second appeal. We disagree.

In general, "a party may not raise in a habeas corpus petition an issue which was raised and rejected on direct appeal, or which could have been, but was not, raised on direct appeal. (*In re Waltreus* (1965) 62 Cal.2d 218 [(*Waltreus*)] [issue which was actually raised on appeal]; *In re Dixon* (1953) 41 Cal.2d 756 [issue which could have been raised on appeal].)" (*In re Saldana* (1997) 57 Cal.App.4th 620, 627-628.) An "exception to the *Waltreus* rule, established by case law, has permitted a petitioner to raise in a petition for writ of habeas corpus an issue previously rejected on direct appeal when there has been a change in the law affecting the petitioner. (See *In re Terry* (1971) 4 Cal.3d 911, 916 [new United States Supreme Court decision justifies postappeal habeas corpus petition]; *In re King* (1970) 3 Cal.3d 226, 229, fn. 2 [new United States Supreme Court cases justify raising issue on habeas corpus even though petitioner failed to appeal]; *In re Jackson* (1964) 61 Cal.2d 500 [new California Supreme Court decision justified postappeal habeas corpus petition].)" (*In re Harris* (1993) 5 Cal.4th 813, 841-842.) Similarly, in *In re Clark* (1993) 5 Cal.4th 750, 775, the court held that "claims which are based on a change in the law which is retroactively applicable to final judgments will be considered if promptly asserted and if application to the former rule is shown to have been prejudicial."

In order to determine whether the petition falls within this exception to the *Waltreus* rule, we must first ask whether the issue Chiara raises was already raised and rejected on direct appeal. Second, we must determine whether there has been a change in the law that is retroactively applicable to Chiara.

Chiara raised the *Wheeler/Batson* issue in his original appeal before us. When Chiara filed his appeal, the law in California did not permit appellate courts to use, for the first time on appeal, comparative juror analysis in considering *Wheeler/Batson* claims.

(*Johnson, supra,* 47 Cal.3d at p. 1221; see also *Lenix, supra,* 44 Cal.4th at pp. 611-612.) We rejected Chiara's claim based on the state of the law in 1995, which precluded us from analyzing his claim using this type of analysis on appeal. Although Chiara did not explicitly argue that we should employ comparative juror analysis in considering his *Wheeler/Batson* claim, he raised the *Wheeler/Batson* issue on direct appeal, and we rejected it. This is sufficient.

The People argue, however, that Chiara was required to demand specifically that we conduct a comparative juror analysis. We disagree. There is no question that Chiara brought a *Wheeler/Batson* claim. That he did not specifically urge this court to apply a mode of analysis that our Supreme Court had explicitly rejected several years earlier does not preclude him from raising this issue now that the court has clarified that such an analysis is permissible.

The next issue we must consider is whether there has been a change in the law affecting Chiara. In 1995, when we considered Chiara's original appeal, we were precluded by *Johnson* from employing, for the first time on appeal, comparative juror analysis. The law in the federal courts, however, ultimately permitted this type of analysis. (See *Miller-El v. Dretke* (2009) 545 U.S. 231 (*Miller-El II*) and *Snyder v. Louisiana* (2008) 552 U.S. 472 (*Snyder*).) Chiara's co-defendants, who pursued their appellate remedies in the federal courts gained relief under federal law. At the time Chiara brought his original habeas petition, however, California law did not explicitly permit such an analysis.

In 2008, our Supreme Court held in *Lenix, supra,* 44 Cal.4th 602, that an appellate court could employ comparative juror analysis to consider a *Wheeler/Batson* claim even if such an analysis was being conducted for the first time by the appellate court. There has, therefore, been a change in the law from the time Chiara brought his original appeal and this order to show cause was issued.

The People argue that this change does not affect Chiara because it is not retroactive. We disagree. A change in the law that "'merely clarifies existing law may

be given retroactive effect even without an expression of legislative intent for retroactivity." (*Negrette v. California State Lottery Com.* (1994) 21 Cal.App.4th 1739, 1744; *Borden v. Division of Medical Quality* (1994) 30 Cal.App.4th 874, 878 and *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232.) As our Supreme Court noted in *Lenix*, "[n]either *Miller-El II* nor *Snyder* changed the *Batson* standard." (*Lenix, supra,* 44 Cal.4th at p. 621.) Nor, of course, does *Lenix*. And, in *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1146, the court held that "*Miller-El* II merely clarif[ies] *Batson* and do[es] not establish new rules of criminal procedure."

Teague v. Lane (1989) 489 U.S. 288 (*Teague*), a case the People discuss at length, is inapplicable here. *Teague* concerns the issue of when a judicial opinion that, for the first time, announces a new principle of law, is retroactive. As *Boyd* and *Lenix* make clear, the application of comparative juror analysis to *Wheeler/Batson* claims is not new law but, rather, an extension of the principles already articulated in *Batson*. Moreover, even if *Teague* were applicable, California courts need not apply this analysis on their habeas claims. (*Danforth v. Minnesota* (2008) 552 U.S. 264 [128 S.Ct. 1029, 1042].)

C. *Wheeler/Batson Claim*

Having found that Chiara is not procedurally barred from bringing his writ, we must now determine whether the jury in this matter was chosen in a racially-discriminatory fashion, in violation of the Sixth and Fourteenth Amendments. As we explain at greater length below, we conclude the prosecutor improperly struck at least one potential juror on the basis of her race. (*Batson*, *supra*, 476 U.S. at p. 98 and *Wheeler*, *supra*, 22 Cal.3d 258.)

1. *Factual and Procedural Background*

The prosecutor excused three Native American women and an Asian woman from the jury. The striking of a single Native American woman—in this case Juror Rindels[1]—

[1] In order to protect their privacy, we ordinarily do not refer to jurors and prospective jurors by name (see, e.g., Code Civ. Proc., §§ 206, 237; *People v. Bennett* (2009) 45 Cal.4th 577, 618-619; Cal. Rules of Court, rule 8.332(b)). However, in this

is a sufficient basis on which to order a new trial. We therefore consider only the facts related to this juror in reaching our decision.

After the defense challenged the prosecutor's exercise of his peremptory challenges to exclude Native American jurors, the trial court held a hearing at which it found that there had been an exclusion of an identifiable group of potential jurors (in this case Native Americans) and requested that the prosecutor explain his reasons for excluding these jurors.

The prosecutor gave a lengthy explanation for striking Juror Rindels, an explanation that we characterized in our earlier opinion in this case as giving "some cause for concern."

He said, "[Ms.] Rindels was the one darker skinned female from the regular panel or the group of seventeen that I challenged. . . . She was a younger, middle-aged [N]ative American female, Trinidad eight years, Humboldt County twenty-five years. She came to the July 29th hardship. She claimed a hardship because she was in the process of completing an application for HUD funding, which was very important I guess to her, and she was the office manager for an [I]ndian tribe and had been for twelve years."

The prosecutor described Rindels' family situation, which included a younger sister who "had been divorced, it was a particularly messy divorce." He noted that her older daughter "had been involved with the criminal justice system." The suspect in that case was her actual father who did a very short period of time apparently in custody." With regard to Rindels' reaction to this crime, he described her as "[s]till a bit emotional and misty. She teared up when she talked about the experience involving her daughter and her father . . . ."

He discussed at length her membership in and work for her tribe: "She works for the tribe, and when we talk about [N]ative Americans in Humboldt County, we're talking essentially about two tribes or separate nations, the Hupa and the Yurok." At this point,

---

case, Juror Rindels' name was first disclosed in 1995 and she has, since that time, been referred to consistently by name. We continue this practice only as to Rindels.

the prosecutor expressed concerns about the ability of Native Americans to function in the criminal justice system: "My experience is that [N]ative Americans who are employed by the tribe are a little more prone to associate themselves with the culture and beliefs of the tribe than they are with the mainstream system, and my experience is that they are sometimes resistive of the criminal justice system generally and somewhat suspicious of the system."

The prosecutor believed that Rindels' request for a hardship exemption demonstrated that "[s]he was pretentious . . . and self-important with the thought that only she could complete the necessary paperwork which would get the grant."

He also described her as "emotional about the system as I indicated before. Her daughter had been molested by her father, and for that reason I'm assuming that the living situation was indicative of something of a dysfunctional family."

In general, the prosecutor "viewed her as somewhat unstable, fairly weak, and somebody who I thought would be easily swayed by the defense."

After the prosecutor described the reasons for exercising a peremptory challenge as to Rindels, the following conversation took place between defense counsel, the court and the prosecutor:

"[Defense Counsel]: Your Honor, I believe that the expressed concern that [the prosecutor] had, particularly Miss Rindels, is a classic example of what the Court—in fact would be used by the appellate courts as a basis for exclusion, because it's a presumption of a group bias based on a stereotype membership in a racial group, and I think that—

"THE COURT: I don't believe that's what it said.

"[Defense Counsel]: That's what I heard. Native Americans that work for tribes are a little more prone to identify with the culture of the tribe, and feel alienated and are not willing to accept the—what is perceived to be the wide [sic] judicial system and the ethics and the legal requirements that are imposed on them by that system. That is a stereotype that is placed upon that lady because she happens to be an [I]ndian and a

member of the tribe. That's exactly what it says as far as—that's what I heard him say, and I think that would be pegged by the appellate courts as being exactly the type of impermissible stereotyping that makes that type of peremptory unconstitutional.

"[Prosecutor]: I would—

"THE COURT: Wait a minute, I want to hear from defense counsel first.

"[Prosecutor]: If I could say one thing on that aspect, in this county we've had Dr. Roy Alsop come in here and explain to the courts and I've seen this on the criminal calendar, child molesting is okay in certain [N]ative American cultures, and we can't treat [N]ative American child molesters the same way we treat other child molesters, and have to treat them through the [I]ndian culture center and there are a whole bunch of people that violate our laws that are [N]ative Americans and they go much more often through the [N]ative American system than the criminal system, and to say that does not exist is frankly incorrect. Dr. Alsop went to San Francisco and testified in the Troy case which resulted in the acquittal on a charge of murder, because there was some sort of racial bias that lasted for a long time in Siskiyou County and accounted for the killing of a police officer."

The defense attorney then objected that "[t]he fact there may be some . . . unique cultural aspects to a person's background is not a basis for exclusion. Assuming everything that he has said is correct, that still wouldn't be a basis for exclusion of a native American Indian . . . ."

The trial court nevertheless found "sufficient justification to support the peremptory challenges." In particular, the trial court rejected the argument that the prosecutor's objection to Rindels was race-based. Rather he perceived her exclusion as based on her work for the tribe, rather than her tribal membership. "With regard to Miss Rindels, my understanding of what [the prosecutor] said is that—one of them is at least that she worked for the tribe, not because she was one of the tribe, but she worked for the tribe. That's entirely different, other than the fact if she's [I]ndian, if she is. I gather that she is."

We affirmed on appeal. Although we concluded that the prosecutor's reasons for excusing Rindels were "race-neutral," we also pointed out that if the prosecutor's only or primary reason for excusing Rindels was that, as a Native American, she could not be expected to respect the criminal justice system, this would give us "some cause for concern." But we found that "the prosecutor gave many more reasons for his evaluation of Mrs. Rindels as a poor juror," including the fact that the prosecutor found her request for a hardship excuse "pretentious" and "self-important," believed her to be "emotional about the system," "unstable, fairy weak and somebody who [the prosecutor] thought would be easily swayed by the defense." Finding these reasons race-neutral, and without conducting any comparative juror analysis, we concluded that there was no *Wheeler/Batson* error.

2. *Legal Principles*

Our Supreme Court recently summarized the general principles to be employed in adjudicating a *Wheeler/Batson* claim. "Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race. [Citations.] Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.]" (*Lenix, supra,* 44 Cal.4th at p. 612.)

The *Lenix* court explained that "[t]he *Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.] The three-step procedure also applies to state constitutional claims. [Citation.]" (*Lenix, supra,* 44 Cal.4th at pp. 612-613.)

A prosecutor must give a "'"clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' [Citation.] 'The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.] Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection. [Citation.] Certainly a challenge based on racial prejudice would not be supported by a legitimate reason.

"At the third stage of the *Wheeler/Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.]" (*Lenix, supra,* 44 Cal.4th at p. 613.)

" 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges " 'with great restraint." ' [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' [Citation.]" (*Lenix, supra,* 44 Cal.4th at pp 613-614.)

We employed these familiar principles in our earlier decision in this case. However, when we reviewed the plausibility of the prosecutor's reasons for striking Native American jurors we did not consider the responses of non-Native-American jurors on similar issues. We do so now. In conducting this comparative juror analysis, we bear in mind that "[I]f a prosecutor's proffered reason for striking a . . . panelist [who is a member of a protected group] applies just as well to an otherwise-similar [non-member of a protected group] who is permitted to serve, that is evidence tending to prove

purposeful discrimination to be considered at Batson's third step." (*Miller-El II, supra*, 545 U.S. at p. 241.) " 'Proof that the defendant's explanation is unworthy of credence' " is, as the *Miller-El II* court observed, " 'simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.' " (*Ibid.*)

However, we are also mindful of the "potentially misleading nature of a retrospective comparative juror analysis performed on a cold record. . . ." (*Lenix, supra,* 44 Cal.4th at p. 621) and that "comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Id.* at p. 622) In conducting this analysis, "such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent. [Citation.]" (*Id.* at p. 624.) In addition, "the question of purposeful discrimination continues to involve an examination of *all* relevant circumstances. Comparative juror analysis was only one part of the United States Supreme Court's exhaustive review in an egregious case. The court did not rule that comparative juror analysis, standing alone, would be sufficient to overturn a trial court's factual finding. Instead the court emphasized: 'The case for discrimination goes beyond these [juror] comparisons to include broader patterns of practice during the jury selection.' (*Miller-El II, supra*, 545 U.S. at p. 253.)" (*Lenix, supra,* 44 Cal.4th at p. 626.) "As a reviewing court, we presume the advocate uses peremptory challenges in a constitutional manner, and defer to the trial court's ability 'to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' (*Wheeler, supra,* 22 Cal.3d at p. 282.)" (*Lenix, supra,* 44 Cal.4th at p. 626.)

Therefore, "[u]nder our deferential standard, we consider whether substantial evidence supports the trial court's conclusions. [Citations.] Evidence is substantial if it is reasonable, credible and of solid value. [Citations.] Comparative juror analysis is a form of circumstantial evidence. [Citation.] The law has long recognized that particular care must be taken when relying on circumstantial evidence. For example, jurors in criminal

cases are instructed that before they can rely on circumstantial evidence to find a defendant guilty, they 'must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence.' [Citation.]" (*Lenix, supra*, 44 Cal.4th at p. 627.) "This same principle of appellate restraint applies in reviewing the circumstantial evidence supporting the trial court's factual findings in a *Wheeler/Batson* holding." (*Lenix, supra*, 44 Cal.4th at p. 628.)

3. *Wheeler/Batson Claim*

With these principles in mind, we look at the record in this case. We recognize, of course, that the Ninth Circuit Court of Appeals found, with regard to Chiara's co-defendants, a *Batson* violation. (*Kesser, supra*, 465 F.3d 351.) It acknowledged, as we did in our review of this matter, that "[d]evoid of context, [the prosecutor's] proffered explanation for his peremptory challenge is at least plausible," (*id.* at p. 362) but then went on to conclude that the "prosecutor's [race-neutral] explanation, read in the context of a 'side-by-side comparison [ ]' with the background and responses of the jurors who were seated, reveals the prosecutor's purposeful and plainly racial motives in excusing Rindels and others. [Citation.]" (*Id.* at p. 362.) In light of our earlier concerns about the prosecutor's racially-motivated statements regarding his challenge to Rindels, coupled with a comparative juror analysis that reveals the prosecutor did not exclude any non-Native American jurors about whom he might have been expected to have similar reservations, we find a violation of *Wheeler/Batson*.

We begin our analysis by noting, as we did in our earlier opinion, that the prosecutor's stated reasons for excluding Rindels included, among seemingly race-neutral explanations, several statements that showed his exclusion of her was based on her race. The prosecutor's description of Native Americans as people who are more likely to "associate themselves with the culture and beliefs of the tribe," and to be "resistive" and

"somewhat suspicious" of the criminal justice system was not a race-neutral reason for excusing Rindels, but rather was an impermissible rationale based on a racial stereotype. Similarly, the prosecutor's suggestion that Native Americans might be expected to look more tolerantly on criminal behavior, such as child molestation, and, therefore, would be poor jurors, amounts to a racial stereotype and, therefore, not a legitimate rationale for exercising a peremptory challenge.[2]

The prosecutor's other justifications, which, when looked at without reference to other jurors were, in contrast, race-neutral. He believed Rindels' request for a hardship exemption showed that she was a person who was "pretentious in my mind and self-important with the thought that only she could complete the necessary paperwork [for the tribe's HUD] grant." He described her as "emotional about the system" because she "teared up" when talking about her daughter's molestation. He believed her family was "dysfunctional" because her daughter had been abused by Rindels' father. He also believed her to be "unstable, fairly weak, and somebody who I thought would be easily swayed by the defense." We will consider each of these reasons in turn.

First, with regard to Rindels' "pretentious" request for a hardship exemption, there is no mention in the record of any non-verbal cues that support this description of Rindels.[3] Her hardship request was written, not verbal, and the voir dire about her excuse

---

[2] Specifically, the prosecutor told the trial court, "If I could say one thing on that aspect, in this county we've had Dr. Roy Alsop come in here and explain to the courts and I've seen this on the criminal calendar, child molesting is okay in certain [N]ative American cultures, and we can't treat [N]ative American child molesters the same way we treat other child molesters, and have to treat them through the [I]ndian culture center and there are a whole bunch of people that violate our laws that are [N]ative Americans and they go much more often through the [N]ative American system than the criminal system, and to say that does not exist is frankly incorrect."

[3] The prosecutor certainly knew how to, and on at least three occasions did, describe on the record non-verbal cues on which he based challenges for cause. These descriptions were specific, extensive, and came immediately after the juror was questioned. Given this practice, we consider it significant that he did not make any contemporaneous comments regarding Rindels' demeanor during the two occasions when

was notable only for its brevity. There was certainly no discussion of any feeling she had that her work for the tribe was irreplaceable.[4]

We would also expect the prosecutor to have excused other jurors who requested hardships exemptions based, or otherwise described themselves as, the only people at their workplace who could perform their job function. The prosecutor did not, however, find such non-Native American jurors objectionably "pretentious." Thus, for example, a juror who served told the court that she would still have to go into her workplace, because "there's no one else trained for my job." Despite this juror's claim that she was the only person at her workplace able to perform her job, she served as a juror. (See also *Kesser, supra,* 465 F.3d at pp. 362-363 [summarizing testimony of jurors who were not struck despite pleading hardship because they were essential to their jobs].) Because there is nothing in the record to support the prosecutor's description of Rindels as pretentious, and given that the prosecutor had no problem with jurors who were not Native American, we conclude this rationale was a sham.

Second, the prosecutor asserted that Rindels had "feelings" about the "system"—presumably negative ones—that made her an objectionable juror. These supposedly

---

she was questioned. Nor did he ask her any follow up questions. The fact that he did neither makes it less likely that he based his challenge to her on non-verbal cues.

[4] The voir dire on Rindels' hardship request is, in its entirety, as follows:

"THE COURT: You are Debra Rindels?

"[Ms. Rindels]: Yes.

"THE COURT: Good, a match. [¶] Ms. Rindels, you indicate you're the only one at work that can fill out the HUD application. I want you to have in mind the only time you'd have to be here other than that would be one other appointment we are setting up for you probably in August, so have you had some time to do that, I guess? [¶] All right, any other concerns that you had that you did not put down?

"[Ms. Rindels]: No.

"THE COURT: All right. We'll have you at this time go down to the jury commissioner's office, fill out the questionnaire, the long one, and submit that back to the jury commissioner's office and follow their instructions thereafter, okay."

negative feelings about the criminal justice system were based on his observation that Rindels "teared up" when talking about her daughter's molestation. The voir dire discussion of her daughter's molestation is as follows:

"THE COURT: And in that particular instance—sorry we have to pry, but I do have to ask you about this—who was involved in that situation?

"[Ms. Rindels]: My oldest daughter.

"THE COURT: Okay. And was the molest by somebody within the family unit?

"[Ms. Rindels]: No, not in our immediate family. It was my father.

"THE COURT: Oh. Did that go to trial.

"[Ms. Rindels]: Yes.

"THE COURT: And that was a criminal trial here in Humboldt County?

"[Ms. Rindels]: Yes.

"THE COURT: And what happened as far as that case is concerned?

"[Ms. Rindels]: He did a couple months' time, but he remained on probation, I think, for approximately two or three years.

"THE COURT: I'm sure it would be that long, and you were satisfied with that conclusion?"

"[Ms. Rindels]: Yes.

There is nothing about this exchange that indicates Rindels had negative "feelings" about the criminal justice system. If she did indeed "tear up" when discussing her daughter's molestation, such a reaction to this event says nothing about her feelings about the justice system. Her verbal responses make clear that her feelings about the "system" were not negative in the least. She agreed that she was "satisfied" with the way in which the proceedings went and did not express any concern with the process.

In contrast, a number of non-Native American jurors described genuinely negative experiences with and attitudes toward the legal system. One juror disclosed that she had been raped, and was not satisfied with the "ultimate conclusion" in which the jury hung on conviction and the district attorney decided not to reprosecute. This juror was,

nevertheless, not excused from service. Another juror described his feeling when he got divorced "at how much the law leaned toward the women . . . ." And yet another juror described how a drunk driver had killed her mother-in-law, but "never paid any price for it except what the minimum would be." This same juror stated that a traffic ticket her son received was not "fair" and that her previous experience as a juror had "confused" her because "all the testimony and everything seemed that he was guilty" but "the way the law was stated . . . of course there was reasonable doubt because none of us saw [the crime being committed]."

None of these jurors was excused. Again, coupled with the prosecutor's misdescription of Rindels' attitude toward the criminal justice system, the fact that jurors who gave far clearer indications of negative feelings toward the "system" were not excused, is circumstantial evidence that the prosecutor did not excuse Rindels for this non-racial reason.

Similarly, there is simply no evidence, much less substantial evidence, to support a conclusion that Rindels' family was dysfunctional. The record indicates that Rindels' father, who molested her daughter, did not live with her and had, in Rindels' view, been appropriately punished. She also stated that she "believe[d] in strong family values" because "we've been the victims, and maybe that's why." Nothing here indicates dysfunction.

Moreover, it is clear that a "dysfunctional" family background, that is, a troubled and/or abusive family life—was not objectionable in non-Native American jurors. One juror explained that, while she was living with her mother and stepfather, her mother was abused and the stepfather was prosecuted for this abuse. Another juror described how, in her family, her parents had been through a "stressful" divorce, that alcoholism ran in her family, as well as drug use and compulsive lying. Neither juror was excused.

As for the prosecutor's very general observation that Rindels was "unstable, fairly weak, and somebody who I thought would be easily swayed by the defense," there is again no evidence to support this observation which is, in fact, contrary to his description

of her as a pretentious and self-important woman. The court did not, in contrast, excuse a non-Native American juror who expressed trepidation and weakness at the thought of being a juror, and told the court that, when he filled out the jury questionnaire "I was pretty nervous—I'm nervous just right now, I feel like I'm the guilty person up here right now."

In sum, none of the prosecutor's seemingly non-racial explanations for excusing Rindels pan out. The prosecutor consistently failed to excuse jurors who were similar to, if not more objectionable than, Rindels. This failure is, of course, circumstantial evidence that his reasons for excusing Rindels were pretextual. We do not, however, base our finding of a *Wheeler/Batson* violation solely on this comparative juror analysis, compelling though this evidence is. Here, as in *Miller-El II* we do not "rule that comparative juror analysis, standing alone, would be sufficient to overturn a trial court's factual finding," but instead base our conclusion on that evidence along with " 'broader patterns of practice during the jury selection.' " (*Lenix, supra,* 44 Cal.4th at p. 626.) As we have explained, in addition to the strong circumstantial evidence that the prosecutor's rationale for excusing Rindels were pretextual, the prosecutor also gave reasons for excluding Rindels that were clearly based on impermissible racial stereotypes. Taken, together then, this evidence leads us to conclude that there has been a violation of *Wheeler/Batson* regarding the prosecutor's challenge of Rindels.

Finally, we note that, at oral argument, the People suggested we remand this case for a new *Batson-Wheeler* hearing. No such remand is warranted. The prosecutor in this case was afforded an opportunity to justify his peremptory challenges and did so at some length, resulting in a record that consists of over fifteen pages of explanation of those challenges. There is no need for any further explanations, especially at this point in time.

IV. DISPOSITION

We reverse and remand for a new trial.

_____
Haerle, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.